



[BILLING CODE: 6750-01S]

FEDERAL TRADE COMMISSION

16 CFR Part 4

Freedom of Information Act; Miscellaneous Rules

AGENCY: Federal Trade Commission (FTC).

ACTION: Final rule.

SUMMARY: The Federal Trade Commission is implementing provisions of the FOIA Improvement Act of 2016 by amending the regulation governing fees the agency may assess to offset the cost of disseminating information and records to the public. The FTC is also making other clarifying changes and updates to the fee regulation.

DATES: These amendments are effective [**insert date of publication in the FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: G. Richard Gold, Attorney, (202) 326-3355, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue N.W., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: In a document previously published in the Federal Register, 81 FR 93861 (Dec. 22, 2016), the Federal Trade Commission, as required by the Freedom of Information Act (FOIA), sought comments on proposed revisions to its fee regulation. *See* 5 U.S.C. 552(a)(4)(A)(i). The FTC proposed to

change its fee schedule to implement the FOIA Improvement Act of 2016 (the “2016 FOIA Amendments”)¹ as appropriate and to revise the regulation to account for other fee-related changes.²

A. Public Comments

The FTC received two comments in response to the proposed rule changes: one from Hartley Rathaway and one from the Reporters Committee for Freedom of the Press (“Reporters Committee”).³

Comment by Hartley Rathaway

The comment from Hartley Rathaway argues that “it is [not] fair that the government should force the citizenry to bear the costs of seeing the truth. Cut spending on wars, cut subsidies for the oligarchs, and then put that money toward uses like these. Charging us fees for information is unjust.” The FTC understands this concern and notes that most agency FOIA responses do not impose any costs on the requester. For example, members of the public are entitled to two hours of free search time and 100 free pages, and are not charged for review time.⁴ Other requester categories (including

¹ On June 30, 2016, President Obama signed into law the FOIA Improvement Act of 2016, Public Law No. 114-185, amending the Freedom of Information Act (FOIA), 5 U.S.C. 552. The new law addresses a range of procedural issues and places additional limitations on assessing search fees (or, for requesters with preferred fee status, duplication fees) if an agency’s response time to a requester is delayed.

² On December 22, 2016, the FTC also implemented a final rule that incorporated other parts of the 2016 FOIA Amendments. 81 FR 93804. Pursuant to 5 U.S.C. 553, these changes did not require public comment.

³ See <https://www.ftc.gov/policy/public-comments/initiative-691> for links to each comment.

⁴ 16 CFR 4.8(b).

Educational, Non-commercial Scientific Institution, or News Media) are not charged for search or review time, and are also entitled to 100 free pages.⁵ The FTC also waives fees if the total chargeable fees for a request are under \$25.00.⁶ Finally, the Commission may produce releasable records without any charge or at a charge reduced below the established fees if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and is not primarily in the commercial interest of the requester.⁷ Requesters are required to provide support for a fee waiver or reduction request, or a request to be granted status in one of the noncommercial requester categories.

Additionally, the FTC follows FOIA statutory language and Office of Management and Budget (“OMB”) directives to recoup allowable direct costs. The Freedom of Information Reform Act of 1986 (“FOIA Reform Act”) charged the OMB with responsibility for promulgating, pursuant to notice and comment, guidelines containing a uniform schedule of fees for individual agencies to follow when promulgating their FOIA fee regulations. 5 U.S.C. 552(a)(4)(A)(i). On March 27, 1987, the OMB issued its Uniform Freedom of Information Act Fee Schedule and Guidelines (OMB Fee Guidelines) but also concluded that issuance of a government-wide fee schedule was precluded by language of the FOIA Reform Act requiring “each agency’s fees to be based upon its direct reasonable operating costs of providing FOIA services.”

⁵ *Id.*

⁶ 16 CFR 4.8(b)(4).

See 52 FR at 10015. The FOIA Reform Act mandated that agencies conform their fee schedules to these guidelines. The guidelines specifically direct that “[a]gencies should charge fees that recoup the full allowable direct costs they incur...and shall use the most efficient and least costly methods to comply with requests for documents made under the FOIA.” *Id.* at 10018. The FTC enforces this OMB directive to recoup allowable direct costs while also providing for lower cost requester categories and fee reductions or waivers as directed.

Comment by the Reporters Committee for Freedom of the Press

The Reporters Committee supports the FTC’s efforts to update its regulations to comply with FOIA but argues that two aspects of the proposed rule are inconsistent with both the text of FOIA and its recent interpretation by the U.S. Court of Appeals for the District of Columbia Circuit in *Cause of Action v. Federal Trade Commission*, 799 F.3d 1108 (D.C. Cir. 2015).

First, the Reporters Committee claims that § 4.8(b)(2)(iii) of the proposed rule sets forth an incorrect definition of “representative of the news media.” Specifically, the Reporters Committee states:

FOIA defines a “representative of the news media” as any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. 5 U.S.C. 552(a)(4)(A) (emphasis added). The Proposed Rule, however, defines a “representative of the news media” as any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to the public.

⁷ 16 CFR 4.8(e).

The Reporters Committee argues that the proposed rule's departure from the statutory text should be revised to mirror the language of FOIA. The FTC agrees and is incorporating the Reporters Committee's suggested edit to the Final Rule's definition of "representative of the news media" as set out in § 4.8(b)(2)(iii).

Additionally, the Reporters Committee also claims that § 4.8(e)(2)(i)(C) of the proposed rule places impermissible limitations on the conditions pursuant to which a public interest fee waiver will be granted. Section 4.8(e)(2)(i)(C) of the proposed rule stated as follows:

The understanding to which disclosure is likely to contribute is public understanding, as opposed to the understanding of the individual requester or a narrow segment of interested persons (e.g., by providing specific information about the requester's expertise in the subject area of the request and about the ability and intention to disseminate the information to the public)....

The Reporters Committee claims that this portion of the FTC's proposed rule does not comply with the recent decision by the U.S. Court of Appeals for the District of Columbia Circuit in *Cause of Action v. Federal Trade Commission*, 799 F.3d 1108 (D.C. Cir. 2015). For public interest fee waivers, the court determined that the FOIA statute does not:

require a requester to show an ability to convey the information to a "broad segment" of the public or to a "wide audience." To the contrary, we have held that "proof of the ability to disseminate the released information to a broad cross-section of the public is not required." . . . FOIA does not require that a requester be able to reach a "wide audience." Rather, as the Second Circuit has held, "the relevant inquiry . . . is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject."

Cause of Action, 799 F.3d at 1116 (emphasis added) (citations omitted).

The Reporters Committee argues that *Cause of Action* shows that for public interest fee waivers it is entirely sufficient if the requested records will increase the understanding of an audience of persons interested in the subject, even if that group is “narrow” as compared to the public at large. *See* Comment by the Reporters Committee (citing *Cause of Action*, 799 F.3d at 1116). The Reporters Committee thus claims that the reference to “a narrow segment of interested persons” as not meeting the standard for “public understanding” for fee waiver determinations should be deleted.

The FTC has considered this suggested edit but is denying the request. The final rule section relating to § 4.8(e)(2)(i)(C) is the same language that was previously proposed. This language complies with the FOIA statute and case law. Both the *Cause of Action* case that the Reporters Committee cites and the subsequent decision in *National Security Counselors v. Department of Justice*, 848 F.3d 467, 472 (D.C. Cir. Feb. 14, 2017), stated that, “although a fee-waiver applicant need not demonstrate its ability to reach a ‘wide audience,’ it must at least show that it can ‘disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.’”

The *National Security Counselors* case then concluded that where a FOIA requester fails to provide sufficiently specific and non-conclusory statements demonstrating its ability to disseminate the disclosures to a reasonably broad audience of persons interested in the subject, that deficiency alone is a sufficient basis for denying the fee waiver request. The *National Security Counselors* court denied the appellant’s fee waiver request and stated that the appellant in that case did not identify a discernible audience for the proposed disclosures and was no more than a clearing house for the

records it received. The appellant did not actively engage in gathering information to produce original publications and did not produce information about the size of its audience or the amount of traffic received by its website. *National Security Counselors*, 848 F.3d at 472, 474. Thus the FTC concludes that a reasonably broad audience interested in the subject is clearly distinct from “a narrow segment of interested persons” and it is appropriate to consider whether the requested disclosure is likely to contribute to the understanding of “a narrow segment of interested persons” as opposed to “public understanding.”⁸

Conclusion

The Commission certifies that the Rule amendments set forth in this final rule do not require an initial or final regulatory analysis under the Regulatory Flexibility Act because the amendments will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b). Most requests for access to FTC records are filed by individuals who are not “small entities” within the meaning of that Act. *Id.* at 601(6). In any event, the economic impact of the rule changes on all requesters is expected to be minimal, if any. The Rule amendments also do not contain information collection requirements within the meaning of the Paperwork Reduction Act, 44 U.S.C. 3501-3520.

List of Subjects in 16 CFR Part 4

⁸ See *Crooker v. Department of the Army*, 577 F. Supp. 1220, 1223 (D.D.C. 1984) (rejecting fee waiver under previous standard for information of interest to “a small segment of the scientific community,” which would not “benefit the public at large”), appeal dismissed as frivolous, No. 84-5089 (D.C. Cir. June 22, 1984).

Administrative practice and procedure, Freedom of information.

For the reasons set forth in the preamble, the Federal Trade Commission amends Title 16, Chapter I, Subchapter A of the Code of Federal Regulations as follows:

PART 4—MISCELLANEOUS RULES

1. The authority citation for Part 4 continues to read as follows:

Authority: 15 U.S.C. 46.

2. Amend §4.8 by revising paragraphs (b)(2)(iii), (b)(6)(i), (b)(7), (e)(2)(i)(C) and (i) to read as follows:

§ 4.8 Costs for obtaining Commission records.

* * * * *

(b) * * *

(2) * * *

(iii) *A representative of the news media* is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of news) who make their products available for purchase by or subscription by the general public or free distribution to the general public. These examples are not intended to be all-inclusive. As traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications

services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would provide a solid basis for such an expectation, but the past publication record of a requester may also be considered in making such a determination. To qualify for news media status, a request must not be for a nonjournalistic commercial use. A request for records supporting the news dissemination function of the requester is not considered a commercial use.

* * * * *

(6)(i) *Schedule of direct costs.* The following uniform schedule of fees applies to records held by all constituent units of the Commission:

Duplication:	
Paper to paper copy (up to 8.5" x 14")	\$0.14 per page
Converting paper into electronic format (scanning)	Quarter hour rate of operator (Clerical, Other Professional, Attorney/Economist)
Other reproduction (e.g., converting from one electronic format to computer disk or printout, microfilm, microfiche, or microform)	Actual direct cost, including operator time
Electronic Services:	

Compact disc (CD)	\$3.00 per disc
DVD	\$3.00 per disc
Videotape cassette	\$2.00 per cassette
Microfilm Services:	
Conversion of existing fiche/film to paper	\$0.14 per page
Other Fees:	
Certification	\$25.00 each
Express Mail	U.S. Postal Service Market Rates
Records maintained at Iron Mountain or Washington National Records Center facilities (records retrieval, refiling, et cetera)	Contract Rates
Other Services as they arise	Market Rates

* * * * *

(7) *Untimely responses.* (i) Except as provided in paragraphs (b)(7)(ii)-(iv) of this section, search fees for responding to a Freedom of Information Act request will not be assessed for responses that fail to comply with the time limits, as provided at 5 U.S.C. 552(a)(4)(A)(viii), §4.11(a)(1)(ii) and §4.11(a)(3)(ii), if there are no unusual or exceptional circumstances, as those terms are defined by 5 U.S.C. 552(a)(6) and §4.11(a)(1)(ii). Except as provided below, duplication fees will not be assessed for an untimely response, where there are no unusual or exceptional circumstances, made to a requester qualifying for one of the fee categories set forth in paragraph (b)(2) of this section.

(ii) If the Commission has determined that unusual circumstances apply and has provided a timely written notice to the requester in accordance with 5 U.S.C. 552(a)(6)(B), the delay in a response is excused for an additional 10 days. If the Commission fails to comply with the extended time limit, it will not charge search fees (or, for a requester qualifying for one of the fee categories set forth in paragraph (b)(2) of this section, will not charge duplication fees).

(iii) If the Commission has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, the agency may charge search fees (or, for requesters qualifying for one of the fee categories set forth in paragraph (b)(2) of this section, may charge duplication fees) if timely written notice has been provided to the requester and the agency has discussed with the requester via written mail, electronic mail, or telephone (or made not less than 3 good-faith attempts to do so) how the requester could effectively limit the scope of the request.

(iv) If a court determines that exceptional circumstances exist, the Commission's failure to comply with a time limit shall be excused for the length of time provided by the court order.

* * * * *

(e) * * *

(2) * * *

(i) * * *

(C) The understanding to which disclosure is likely to contribute is public understanding, as opposed to the understanding of the individual requester or a narrow segment of interested persons (e.g., by providing specific information about the requester's expertise in the subject area of the request and about the ability and intention to disseminate the information to the public); and

* * * * *

(i) *Means of payment.* Payment shall be made either electronically through the Department of Treasury's pay.gov website or by check or money order payable to the Treasury of the United States.

* * * * *

By direction of the Commission.

Donald S. Clark,
Secretary.

[FR Doc. 2017-09432 Filed: 5/9/2017 8:45 am; Publication Date: 5/10/2017]